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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 389

THE CANISTER COMPANY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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THE CANISTER COMPANY,

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Canister Company, respectfully shows:

Summary Statement of the Matter Involved

The Court of Claims of the United States ruled that a document which refers on its face to a missing schedule said to be annexed is admissible in evidence over the objections of the opposing party. The ruling was made in denying an application by petitioner for a refund of income tax of $3,351.99, plus interest, which was wrongfully

assessed and which was paid by petitioner to the Collector of Internal Revenue for the Fifth District of New Jersey in respect to the fiscal year ended April 30, 1941.

The judgment of the Court of Claims was entered on April 7, 1947. The opinion written by Judge Whitaker is reported (70 F. Supp. 904). Petitioner's motion for a new trial was overruled on July 7, 1947. The order denying such motion is not yet reported.

The Commissioner of Internal Revenue, in a "deficiency notice" dated June 16, 1947, determined that petitioner overpaid by $3,351.99 its income tax for the fiscal year ended April 30, 1941; he also determined a deficiency of $3,011.88, plus interest, in excess profits tax of petitioner for the same fiscal year, which was paid on January 17, 1945. When petitioner duly filed a claim for refund of the amount of overpayment of income tax which the Commissioner of Internal Revenue had determined petitioner had made, the Commissioner failed to approve such claim although he did not formally disapprove it.

Since statutory determinations by the Commissioner are presumptively correct the respondent had the burden of disproving the accuracy of the Commissioner's determination. In attempting to maintain this burden the respondent undertook to show that petitioner allegedly overstated the bases to it of certain assets which it acquired in 1924 from one Raphael T. Garfein (Gwathmey) in a tax-free exchange and consequently that petitioner took an excessive depreciation deduction for the fiscal year here involved. For all prior fiscal years the Commissioner and his predecessors, in their audits of petitioner's returns and examinations of its books, had determined the bases of the assets in question to be as claimed by petitioner, with minor exceptions. To support his contention and to establish the bases to petitioner of the assets the respondent offered in evidence a photostatic copy (Defendant's Exhibit "D")

of an incomplete bill of sale which had been filed with the County Clerk of Warren County, New Jersey, in 1924. Without a greater showing than this, the Court of Claims erroneously upset administrative determinations of long standing made on the very point here in issue and despite the incompleteness of the document offered by the respondent held that petitioner was not entitled to recover.

Defendant's Exhibit "D" purports to be a certified copy of a bill of sale from The Canister Company of New Jersey (a corporation entirely unrelated to petitioner) to Mr. Gwathmey dated April 22, 1924, and relates to a sale to Mr. Gwathmey for a consideration of $100,000 of "the fibre can business conducted by the party of the first part [The Canister Company of New Jersey], together with the goodwill thereof, and together with the equipment shown upon Schedule 'A' hereto attached." Counsel for petitioner took exception to the introduction of Defendant's Exhibit "D" into evidence on the ground that it was clearly incomplete, Schedule "A" being missing.

The Court of Claims erroneously relied upon Defendant's Exhibit "D" in denying petitioner's claim for repayment of taxes wrongfully assessed and collected. The opinion of the Court of Claims states that:

> "The original of the bill of sale [Defendant's Exhibit 'D'] a copy of which was introduced, was in plaintiff's possession. If plaintiff thought the omitted portion material to the issue, it was available to it and could have been introduced by it. Under such circumstances we do not think it was erroneous to have received the bill of sale without the schedule" (R. 24; 70 F. Supp. at 909).

The Court of Claims assumed in its decision, contrary to the facts and without support in the record or in the findings of fact in this cause, that petitioner is in possession of the original bill of sale. The original of the incomplete

bill of sale introduced by the respondent is not now and has not been in petitioner's possession. Petitioner was not a party to such sale and there is no reason to believe that the original or a copy of the bill of sale is or was in petitioner's possession. The Court has thus based its decision on its own erroneous assumption, not supported either by the record or by justifiable inferences.

The Court of Claims erroneously held that the schedule missing from Defendant's Exhibit "D" "would have added nothing that is material to the issue presented" (R. 24; 70 F. Supp. at 909), for the Court considered that such incomplete document, when taken together with a certain journal entry in petitioner's books of account, established the basis to Mr. Gwathmey, and therefore to petitioner, of certain assets transferred by him to petitioner in 1924 in a tax-free exchange. The error of this is plain, for one of the two factors upon which the Court of Claims relied, namely, Defendant's Exhibit "D", was inadmissible as evidence and could not properly be considered by the Court for *any* purpose. The absence of Schedule "A" from Defendant's Exhibit "D" was fatal to the respondent's cause and the Court of Claims should have so held.

It is impossible to determine from the evidence introduced by the respondent what specific assets supposedly were purchased by petitioner's transferor from The Canister Company of New Jersey in 1924, or what price he paid for them. Neither does the evidence disclose that the depreciable assets owned by petitioner in the fiscal year ended April 30, 1941, were all purchased by its transferor from the same source or that a cost basis other than that employed by petitioner is allocable to each of these assets. Accordingly, the respondent's proof was completely valueless and failed to sustain its defense to this cause of action and it was error for the Court of Claims to hold that the respondent sustained its burden of proof.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by the United States Code, Title 28, Section 288(b), as amended (Act of February 13, 1925, c. 229, Sec. 3, 43 Stat. 936, 939; Act of May 22, 1939, c. 140, 53 Stat. 752).

Questions Presented

1. Whether a document which refers on its face to a missing schedule said to be annexed thereto is admissible in evidence in the Court of Claims over the objection of the opposing party.

2. If a document incomplete on its face and to which petitioner was not a party is admissible in evidence in the Court of Claims, is such a document sufficient (a) to maintain the respondent's burden of proving erroneous a determination by the Commissioner of Internal Revenue in a statutory deficiency notice that petitioner had overpaid its income tax for the fiscal year here involved or (b) to upset bases for depreciation employed by petitioner uninterruptedly for almost twenty years and accepted during that entire period by the Commissioner after audits of petitioner's tax returns?

3. Whether the Court of Claims can base a decision in a case before it on unjustifiable assumptions and supposed facts not supported by the record and not the subject of a special finding of fact by that Court.

Reasons Relied On for Allowance of the Writ

This Court is requested to grant the writ for the following reasons:

1. The Court of Claims summarily passed on the admissibility of Defendant's Exhibit "D", a document incomplete on its face and to which petitioner was not a party,

without considering the case of *Moore* v. *United States*, 91 U. S. 270, in which this Court held that unless Congress otherwise provides (it has not done so on the question here at issue) the Court of Claims must follow the rules of evidence of the common law; the cases of *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654; *South Carolina* v. *United States*, 199 U. S. 437, 449-450; *Kepner* v. *United States*, 195 U. S. 100, 125-126; see *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U. S. 92, 101-102, in which this Court made it clear that in this connection the common law is the common law as of the time of the approval of the Constitution of the United States; and the cases of *Young* v. *The Bank of the State of Alabama*, 5 Ala. (N.S.) 179, 39 Am. Dec. 322 (1843); *English* v. *Johnson*, 17 Cal. 107, 119, 76 Am. Dec. 574 (1860); *Cockcroft* v. *Metropolitan Life Insurance Co.*, 125 Pa. Sup. Ct. Rep. 293, 189 Atl. 687 (1937); *McGrath & Jones* v. *Isaacs*, 1 N. & McC. Rep. (9 So. Car.) 563, 573 (1819); see cases cited in 1 Wharton on Evidence (3rd Ed.) § 619, which state the common law rule that a document which is incomplete on its face is inadmissible over the objection of the opposing party.

2. Assuming arguendo that the patently incomplete copy of the purported bill of sale, to which petitioner was not a party, was admissible in evidence, the introduction of such document by the respondent was insufficient to overcome the presumption of correctness which attaches to the determination of the Commissioner of Internal Revenue in a statutory deficiency notice dated June 16, 1947, that petitioner overpaid by $3,351.99 its income tax for the fiscal year here involved. Determinations in such a notice are presumptively correct, and the burden of proving them incorrect is upon those seeking to upset such determinations. The Court of Claims erroneously failed to find that where the burden of proof is upon the respondent and the deter-

mination sought to be upset exactly conforms with the treatment which the Commissioner had accorded petitioner's tax returns over a period of almost 20 years, then the measure of the respondent's burden of proof is such that it is not met by the introduction of a document to which petitioner was not a party and which is incomplete on its face.

3. The Court of Claims failed to find in its special findings of fact that the original of the bill of sale, a purported copy of which was introduced by the respondent as Defendant's Exhibit "D", was in plaintiff's possession and thus available to it. Indeed the respondent offered no evidence which would support such a finding, for petitioner was not a party to the sale between The Canister Company of New Jersey and Mr. Gwathmey and is not now and has not been in possession of the original of the incomplete purported bill of sale introduced by the respondent. Accordingly, even should this Court now hold that the common law rules of evidence do not govern in the Court of Claims, the supposed rule of law enunciated by the Court of Claims as governing this case does not, on the facts as found by that Court, justify a denial of petitioner's claim and a judgment in favor of the respondent. (See *United States* v. *Harris*, 77 Fed. 821, 825; 8 Cyclopedia of Federal Procedure § 3413, p. 30 (2nd Ed. 1943).) Congress has specifically authorized this Court to review the decision of the Court of Claims in order to rectify this error. (United States Code, Title 28, Sec. 288, as amended by Act of May 22, 1939, c. 140, 53 Stat. 752.)

4. A determination by this Court of the questions presented here are important to the proper administration of the tax laws, and also to the proper administration of justice in the Court of Claims. It is not proper for a court to permit its own assumptions to take the place of competent evidence which should have been produced by

the Government, and the Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Court of Claims of the United States commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., October 6, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 389

THE CANISTER COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 21–26) is reported at 70 F. Supp. 904.

JURISDICTION

The judgment of the Court of Claims was entered on April 7, 1947. (R. 27.) Petitioner filed a motion for new trial on June 6, 1947. The motion for new trial was overruled on July 7, 1947. (R. 27.) The petition for a writ of certiorari was filed on October 6, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the evidence presented to the Court of Claims required judgment in petitioner's favor for refund of income tax paid by petitioner for its fiscal year ended April 30, 1941.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(b) *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; * * *.

* * * * *

(26 U. S. C. 1940 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(8) *Property acquired by issuance of stock or as paid-in surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) * * *.

(B) * * * then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * *

(26 U. S. C. 1940 ed., Sec. 113.)

Sections 203 (b) (4) of the Revenue Acts of 1924, c. 234, 43 Stat. 253, and 1926, c. 27, 44 Stat. 9, contain provisions identical with the quoted portion of Section 112 (b) (5) of the Internal Revenue Code.

STATEMENT

The facts found by the Court of Claims (R. 15–21) may be summarized as follows:

The petitioner is a New Jersey corporation organized April 19, 1924, by one Raphael T. Garfein, now known as Raphael T. Gwathmey. He has been petitioner's president and sole stockholder at all times since its organization. On August 14, 1941, the petitioner filed its final income and excess profits tax returns for its fiscal year ended April 30, 1941, showing an income tax liability of $7,735.99 and excess profits tax liability of $1,823.96. The taxes shown due on the returns were duly paid in quarterly installments. (R. 15, 16.)

Pursuant to a Revenue Agent's report dated February 27, 1943, the Commissioner of Internal Revenue, on June 16, 1944, notified petitioner of his determination of an overassessment of income tax for the fiscal year 1941 in the amount of $3,351.99 and a deficiency of excess profits tax for the same year in amount of $3,011.88. On July 11, 1944, the petitioner filed a claim for refund of the amount of overassessment of income taxes shown. On October 19, 1944, the Collector of Internal Revenue at Newark, New Jersey, transmitted to petitioner a "Notice and Demand" showing the assessed deficiency of excess profits tax and interest for 1941 totaling $3,598 and an offset of the determined overassessment of income tax for the same year in the amount of $3,351.99. The demand for payment was for the difference, or balance due, of $246.01. On January 17, 1945, the petitioner delivered to the Collector its check for $3,598, representing the entire amount of the deficiency of excess profits tax and interest assessed against it for 1941. (R. 16, 17.)

In the computation of petitioner's tax liability for 1941, the petitioner had been allowed depreciation deductions for the year aggregating $16,973.21. However, by a Revenue Agent's report dated February 15, 1945, the same investigating Agent recommended reduction of the allowable depreciation for 1941 to $9,505.53. The Agent's adjustments of original book valuations of assets

acquired by the petitioner in 1924 and 1926 from Garfein (Gwathmey), which had not previously been fully depreciated, provided the basis of the changed allowance recommended for the fiscal year 1941. The revision of petitioner's depreciation account resulted in a recomputation of the petitioner's excess profits tax liability for 1941 showing a deficiency therein, barred from assessment by the applicable statute of limitations, in excess of the amount of the previously determined overassessment of income tax. The petitioner was notified by letter dated March 12, 1945, that its claim for refund for $3,351.99 would be disallowed accordingly. (R. 18.)

By a bill of sale executed April 22, 1924, The Canister Company of New Jersey (not connected with the petitioner) sold and transferred to Garfein (Gwathmey) the fibre can business previously conducted by that corporation, together with the good will thereof and the equipment used in the business. The bill referred to an itemized list of the equipment attached as Schedule A. The consideration for the sale was $100,000. The bill also authorized the buyer to assign the entire agreement to a corporation to be organized by him and to be known as "The Canister Company." The petitioner immediately took over from Garfein (Gwathmey) all assets referred to in the bill of sale and made opening entries in its journal showing them valued at $238,085.37. Petitioner

issued its stock to Garfein (Gwathmey) in the amount of $163,085.37 and assumed his liability for $75,000, represented by his notes in that amount given to the corporation from which he had acquired the assets. Petitioner's journal entry contained the explanation "Stock issued for the business formerly owned by The Canister Co. of N. J. and sold to The Canister Company by R. T. Garfein. Note issue payable equal yearly maturities—First maturity Sept. 1, 1925." In June 1924 petitioner's journal shows additional assets acquired from Garfein consisting of patents valued at $24,081.87 and good will valued at $42,832.76, against which petitioner issued additional common stock to Garfein in the amount of $66,914.63. That completed the issuance of the entire authorized capital stock of petitioner in the amount of $250,000. (R. 18–20.)

On April 22, 1924, The Canister Company of New Jersey leased to Garfein for a period of five years the manufacturing plant formerly occupied by the lessor. The lease authorized him to assign all rights thereunder to the petitioner, and such assignment was executed on April 24, 1924. The lease also contained an option to purchase the leased property at any time during the term of the lease for $100,000. (R. 20.)

In March 1926 petitioner recorded in its journal the plant property purchased by Garfein per-

sonally and by him turned over to petitioner at the following values (R. 20):

Land	$25,000.00
Buildings	300,957.35
Equipment	16,027.62
Total	341,984.97

On April 12, 1926, The Canister Company of New Jersey conveyed direct to petitioner the land and buildings which were subject to the lease outstanding to Garfein. (R. 21.)

As its basis for depreciation deductions for all taxable years from the dates of acquisition in 1924 and 1926 through 1941, petitioner used the values set up on its journal as shown above. (R. 21.)

ARGUMENT

The petitioner in the Court of Claims elected to rest its claimed right to recover an alleged overpayment of income taxes for its fiscal year ended April 30, 1941, on the presumptive correctness of a Revenue Agent's report dated February 27, 1943, and a letter transmitted to it by the Commissioner of Internal Revenue on June 16, 1944, finding an overassessment of income tax for the fiscal year ended April 30, 1941. The Government, contending that this determination of petitioner's tax liability for 1941 was erroneous, introduced evidence showing that the Agent had made a second investigation and report dated February 15, 1945, disclosing an actual deficiency

of excess profits tax due for 1941 in excess of the amount of the previously determined overassessment of income tax. Although the deficiency was barred from assessment by the applicable statute of limitations, no question has been raised as to the right of the Commissioner to offset the excess profits tax deficiency thus found against the income tax overassessment. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. The report of February 15, 1945, was approved and constituted the final determination of petitioner's tax liability for 1941 by the Bureau of Internal Revenue. The basis of the revision of petitioner's tax liability for 1941 was the Agent's adjustment of petitioner's original costs of assets acquired in 1924 and 1926 as they appeared in petitioner's depreciation accounts.

In no way has petitioner challenged the correctness of this final determination of its tax liability for 1941. Its case rests on the premise that the Government's position was not supported by sufficient competent evidence. The evidence shows, however, that in 1924 Garfein (Gwathmey) acquired for cash and personal notes the going business and fibre can manufacturing equipment which had previously been operated by The Canister Company of New Jersey. The business has since been operated by petitioner. The Canister Company of New Jersey was dissolved long ago. In 1926 Garfein acquired title to the plant

real estate in the same manner and from the same corporation. Immediately upon acquisition of properties in 1924 and 1926, Garfein transferred them to this petitioner for its entire capital stock and certain credits to his account on petitioner's books. From the available evidence it is clear that Garfein's total costs for the assets were $100,000 for those acquired in 1924 and $70,000 for those acquired in 1926. Under the provision of Sections 112 (b) (5) and 113 (a) of the Internal Revenue Code, and corresponding provisions of the Revenue Acts of 1924 and 1926, *supra,* the petitioner's basis for the assets was the same as Garfein's, yet the petitioner opened its books by valuing the assets acquired in 1924 from Garfein at $238,085.37, of which the books ascribed $221,626.64 to depreciable items. For the property acquired in 1926 from Garfein, petitioner set up a value in its books of $341,984.97, including depreciable items of $316,984.97. The Bureau of Internal Revenue has determined that the assets were entered on petitioner's books as a basis for subsequent depreciation at a value far in excess of their costs. That determination carries the presumption of correctness. See *McIlhenny* v. *Commissioner,* 39 F. (2d) 356 (C. C. A. 3d); *Burnet* v. *Porter,* 283 U. S. 230; *Mollohon Mfg. Co.* v. *United States,* 80 C. Cls. 35, 8 F. Supp. 725; *Cerro de Pasco Copper Corp.* v. *United States,* 82 C. Cls. 442, 13 F. Supp. 633, certiorari denied, 298 U. S. 686; *Wilson & Co.* v. *United States,* 82 C.

Cls. 261, 15 F. Supp. 332. Insofar as it is inconsistent with the determination made in 1941, it supplants the earlier determination which is no longer presumed to be correct. *Austin Co.* v. *Commissioner,* 35 F. 2d 910 (C. C. A. 6th), certiorari denied 281 U. S. 735.

Depreciation allowances involve primarily questions of fact. Petitioner's burden in this case, as in any other action for recovery of internal revenue taxes in the Court of Claims, was to establish the illegality of the collection and petitioner's right to recover as claimed. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, affirming 67 C. Cls. 693; *Rosenstadt & Waller* v. *United States,* 79 C. Cls. 698, 7 F. Supp. 287. The petitioner has not met this burden. The taxpayer's book entries are not conclusive of amounts of depreciation actually sustained. *Globe-Wernicke Co.* v. *United States,* 80 C. Cls. 105, 8 F. Supp. 711. It appears proper to note that petitioner's president and sole stockholder since the date of its organization—and the only man alive with first-hand information of all the facts relevant to petitioner's acquisition of assets—failed to testify, either in support of petitioner's claim or in refutation of the testimony and documentary evidence introduced by the Government through the Revenue Agent. As to the inference which may properly be drawn from such failure, see *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 51, 52; *Runkle* v. *Burnham,* 153 U. S. 216; *Kehoe*

v. *Commissioner,* 105 F. 2d 552 (C. C. A. 3d), reversed on other grounds, 309 U. S. 277.

The petition for certiorari in this case presents no reviewable question to this Court. *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533. Bringing before this Court only the Court of Claims findings of fact, without all the evidence relied on by the court to support its findings, the petitioner asks this Court to review the judgment on the ground that one exhibit referred to in the findings was incomplete and was improperly admitted in evidence. This Court has often stated that it would not exercise such functions on certiorari to the Court of Claims. See *Luckenbach S. S. Co.* v. *United States, supra,* at pp. 538, 539.

The only possible exception to the foregoing would appear to be in a case where under Rule 38 (5) (b) of the Supreme Court, made applicable to the Court of Claims by Rule 41 (3), this Court found that the lower court had so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Manifestly there is no warrant in this case for the application of that rule. The Court of Claims received all the evidence presented by petitioner and decided the case against petitioner on the entire record. The petitioner disagrees with the result and contends here that the court below

placed undue reliance upon a document alleged to have been erroneously admitted in evidence. The respondent disagrees with the petitioner on all counts, but respectfully submits that no question has been properly presented to this Court for review. Cf. *Cramp* v. *United States,* 239 U. S. 221; *McClure* v. *United States,* 116 U. S. 145; *Luckenbach S. S. Co.* v. *United States, supra.* There was substantial evidence introduced in the court below to support the court's judgment even without the challenged document.

CONCLUSION

The decision below does not result in any conflict. The question is one of fact and is not of general importance. The record presented to this Court does not present any question subject to this Court's review. The petition should, therefore, be denied.

Respectfully submitted.

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NOVEMBER, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947